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No. 05-1284

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION; AND PHILIP MORRIS, INCORPORATED, A CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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The Eighth Circuit's decision in this case is the most far-reaching expansion of the federal officer removal statute ever decided by a federal court. The court below held that Philip Morris, sued here under state law in state court for purely commercial acts arising from its marketing of light cigarettes, could remove to federal court because it was "acting under" a federal officer. 28 U.S.C. § 1442(a)(1). The absurdity of that holding is demonstrated, in part, by the fact that the federal government is currently suing Philip Morris for the very same acts that the company claims entitle it to removal as though it is an officer of the federal government. The Eighth Circuit's decision directly conflicts with this Court's construction of previous iterations of the federal officer removal statute in *City of Greenwood v. Peacock*, 384 U.S. 808 (1966), a case not cited by the Eighth Circuit. *Peacock* holds that, to the extent § 1442(a)(1) protects private actors, such actors (unlike Philip Morris here) must be assisting federal officers in enforcing federal law. This Court's review is urgently needed to correct the Eighth Circuit's errant approach, to bring clarity to an issue that divides and confuses federal courts, and to preserve a proper jurisdictional balance between the federal and state judicial systems.

THE EIGHTH CIRCUIT'S ERRONEOUS DECISION FURTHER DIVIDES THE FEDERAL COURTS

A. Federal Courts Are Divided Over § 1442(a)(1)

Circuits have adopted markedly different approaches to applying the federal officer removal statute in cases involving private actors. Philip Morris's contrary claim (Opp. 11) improperly focuses on the fact that those cases upheld removal, while ignoring that the legal tests announced in those cases would not support Philip Morris's bid to invoke § 1442(a)(1). The outcome here unquestionably would have been different in three other circuits.

Philip Morris does not challenge that the First, Seventh, and Eleventh Circuits have articulated a test with dispositive factors – such as the official character of acts by private parties – that are *irrelevant* under approaches

taken by the Fifth and Eighth Circuits. And the Ninth and Tenth Circuits have framed tests that exacerbate the confusion among the circuits, because those circuits allow private actors to remove absent any claim that the defendants were engaged in official conduct *or* that the government exercised comprehensive or detailed control.

In *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482 (1st Cir. 1989), for instance, the First Circuit held that, "[i]n . . . circumstances" when a private party acts "strictly and solely at federal behest" in carrying out "official government business," "the reach of section 1442(a)(1) extends to private persons . . . who act under the direction of federal officers." *Id.* at 486. Although the court upheld the removal of a telephone company assisting federal officers in carrying out official surveillance, the test it applied plainly diverges from the Eighth Circuit's test, which deemed *irrelevant* whether Philip Morris was carrying out official governmental business.

Likewise, in *Venezia v. Robinson*, 16 F.3d 209 (7th Cir. 1994), the Seventh Circuit held that the defendant – a state officer – was entitled to removal based on the claim that he acted "at all pertinent times . . . under the direction of agents of the Federal Bureau of Investigation as part of a criminal investigation, and that during the two-hour meeting with Venezia he had been wearing a tape recorder at the federal agents' request." *Id.* at 211; *see also id.* (defendant was "participating in a federal investigation and acted under the instructions of federal agents"). Crucially, the Seventh Circuit emphasized the defendant's actions were "in the course of a criminal investigation," *id.* at 212, thereby underscoring the official character of those acts. Contrary to the Fifth and Eighth Circuits, the Seventh Circuit does not analyze the comprehensiveness or detail of federal control as dispositive factors for removal.

So too in *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424 (11th Cir. 1996). There, the defendant alleged that he "was acting on behalf of the [Federal Aviation Ad-

ministration ("FAA")], under the authority granted to him by the FAA, and within the limits prescribed by the FAA." *Id.* at 1427. Importantly, in deciding that removal was proper, the court did not make the comprehensiveness or detail of FAA oversight dispositive, but rather found it crucial that the defendant was "an authorized agent of the FAA" to whom the FAA had "delegate[d]" some of the "powers and duties" of the government. *Id.* at 1428.[1]

By focusing upon the official character of the defendant's conduct, those cases construe § 1442(a)(1) in a manner that starkly conflicts with the Eighth Circuit's analysis of "federal control." Although Philip Morris insists that removal was not denied in any of those cases and that the "official function" approach is not exclusive of the Eighth Circuit's "federal control" test (Opp. 11-12), it ignores that several district courts have denied removal on the ground that the defendant was not engaging in official governmental conduct. Those decisions underscore the inconsistent outcomes at the district court level – where removal and remand are fought out largely without appellate review (*see* Pet. 9 n.1) – from applying the different circuits' various tests for "acting under."

In *Brown & Williamson Tobacco Corp. v. Wigand*, 913 F. Supp. 530 (W.D. Ky. 1996), for example, the court held that the "[c]ase law demonstrates that the purpose of [§ 1442(a)(1)] is to protect officials who are enforcing federal laws." *Id.* at 533. The court found that standard was not met when a party is subpoenaed to testify before a grand jury because "he has not been directed to perform official functions as an officer or agent of the government." *Id.* That case thus illustrates how an official function framework – like that taken by the First, Seventh, and Eleventh Circuits – is fundamentally divergent from a

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[1] *Lovell Manufacturing v. Export-Import Bank of the United States*, 843 F.2d 725, 734 n.13 (3d Cir. 1988), questions whether "a mere agency-principal relationship between [a federal agency] and [a private corporation] would be sufficient to support jurisdiction" under § 1442(a)(1).

comprehensive and detailed control test, under which a subpoenaed party might very well have a claim to removal. Other district courts also make that point clear.[2]

Given that Philip Morris makes no effort to account for those decisions, which have read § 1442(a)(1) in light of its historical purpose of protecting those enforcing federal law, its assertions that there is no such thing as an official function test (Opp. 13) and that federal courts have treated private actors invoking § 1442(a)(1) uniformly (Opp. 14) have no merit.

The Ninth and Tenth Circuits have added to the confusion among the courts by making broad, unrefined judgments about whether the defendant was acting under federal control. *See California v. H&H Ship Serv. Co.*, No. 94-10182, 1995 WL 619293 (9th Cir. Oct. 17, 1995) (judgment noted at 68 F.3d 481); *Greene v. Citigroup Inc.*, No. 99-1030, 2000 WL 647190 (10th Cir. May 19, 2000) (judgment noted at 215 F.3d 1336). In those circuits, contrary to both the official function test and the comprehensive and detailed control test, nearly *all* private regulated parties would presumptively be entitled to removal.

Federal district court decisions reflect the divergent legal tests and resulting confusion on two fronts: first, whether a private actor must have been engaged in official conduct to avail itself of § 1442(a)(1); and, second,

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[2] *See Freiberg v. Swinerton & Walberg Prop. Servs., Inc.*, 245 F. Supp. 2d 1144, 1150 (D. Colo. 2002) ("private actors seeking to benefit from [§ 1442(a)(1)] bear a special burden of establishing the official nature of their activities"); *Bakalis v. Crossland Sav. Bank*, 781 F. Supp. 140, 145 (E.D.N.Y. 1991) (removal is permitted "only when the corporation is so intimately involved with government functions as to occupy essentially the position of an employee of the government"); *Kaplansky v. Associated YM-YWHA's of Greater New York, Inc.*, No. 88 CV 1292, 1989 WL 29938, at *3 (E.D.N.Y. Mar. 27, 1989) (parties complying with subpoena were not "acting under" federal officer because defendants were not "asked to stand in the shoes of [federal] officers or agents and perform 'official' functions"); *see also Northern Colorado Water Conservancy Dist. v. Board of County Comm'rs*, 482 F. Supp. 1115, 1118 (D. Colo. 1980).

what degree of federal control warrants removal.[3] Philip Morris entirely overlooks the first type of conflict, as set forth above, and it takes wholly inconsistent positions on the second. *Compare* Opp. 16 (asserting that "district courts have had no problem in distinguishing between cases that satisfy [a detailed control test] and those that do not") *with id.* (noting that multiple district courts, on the same facts as *Watson*, "reached a different conclusion as to whether the [Federal Trade Commission] had exercised sufficient control for purposes of § 1442(a)(1)").[4]

B. *Watson* Conflicts With This Court's Precedent

The Eighth Circuit's decision is strikingly incorrect, as it conflicts with the text and purposes of § 1442(a)(1), as interpreted by this Court. The federal officer removal statute does not extend a privilege of removal to a private regulated actor complying with federal law. It surely does not do so where the "regulation" of the industry is as meager as it is here. *See* Public Citizen *Amicus* Br. 5-12.

1. This Court's decision in *Peacock* shows why § 1442(a)(1) protects private actors only insofar as they are affirmatively assisting federal officers in enforcing federal law. *See* Pet. 19-20. Philip Morris's efforts (at 26) to distinguish the decision betray a basic misunderstanding of the case. In *Peacock*, this Court construed § 1443(2) in light of the progenitor of that statute in the Civil

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[3] *See McMahon v. Presidential Airways, Inc.*, 410 F. Supp. 2d 1189, 1196 (M.D. Fla. 2006) ("there are varying formulations of the test for removal under the federal officer provision"); *Lalonde v. Delta Field Erection*, No. Civ. A. 96-3244-B-M3, 1998 WL 34301466, at *2 (M.D. La. Aug. 6, 1998) ("Neither the Supreme Court nor the Fifth Circuit have established what is required to show that a government contractor is 'acting under' an officer of the United States or of an agency thereof. Cases from other federal district courts . . . vary in their approach to what is required under this element.").

[4] That district courts do not always follow the decisions of the appropriate courts of appeals (*see* Opp. 15, 16 n.7) only underscores the confusion surrounding § 1442(a)(1) and the need for this Court's review. The outcome of a removal decision thus turns not only upon the circuit, but also the district court, that hears the case. *See* Pet. 17.

Rights Act of 1866, which spoke of "any officer, civil or military, or *other person*." 384 U.S. at 815 (internal quotation marks omitted). The Court held that the "other person" clause tracked the Customs Act of 1815, which, as we have pointed out, was a precursor to § 1442(a)(1). *See* Pet. 4. The Court then read the Customs Act as allowing removal by private parties – *i.e.*, other persons – but only for acts "aiding or assisting" customs officers in performing "official actions." 384 U.S. at 820 n.17. Furthermore, the Court found that the "acting under" clause of the federal revenue officer statute – adopted in 1866 – "obviously drew on the comparable characterization of the 'other person' in the Customs Act of 1815." *Id.* at 823 n.20.

Peacock thus makes clear that the "other person" language of the precursor to § 1443(2) and "other person" and "acting under" provisions of statutory antecedents to § 1442(a)(1) should be construed *in pari materia*.[5] That is crucial here because the Court also concluded that § 1443(2) "confers a privilege of removal only upon federal officers or agents and those authorized to act with or for them in affirmatively executing duties under any federal law providing for equal civil rights." *Id.* at 824. And, the Court explained, that "limitation . . . to official enforcement activity . . . draws support from analogous provisions in the removal statutes available to federal revenue officers." *Id.* at 820 n.17.[6] The Eighth Circuit's

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[5] Philip Morris's point (at 26) that § 1442(a)(1) is broader than § 1443(2) is true, but irrelevant. The reason § 1442(a)(1) is broader than § 1443(2) is that by affording protection to all federal officers – irrespective of whether they are enforcing civil rights statutes – § 1442(a)(1) may functionally encompass all of § 1443(2). The key point here is that this Court held that § 1443(2) contains an implied "acting under" limitation analogous to the federal officer removal statute. *See In re County Collector of County of Winnebago*, 96 F.3d 890, 897 (7th Cir. 1996) (noting *Peacock* held § 1443(2) was "limited to enforcement activity by federal officers and those *acting under* them") (internal quotation marks omitted, emphasis added).

[6] *See also Davis v. South Carolina*, 107 U.S. 597, 600 (1883) ("non-commissioned officer in the army, detailed as a guard in aid of" a marshal tasked with enforcing revenue laws, was entitled to removal

interpretation of § 1442(a)(1), which elides the difference between a party *enforcing* federal law and a party *complying* with federal law, is thus inconsistent with this Court's precedent.

2. Philip Morris's reliance (at 25) on the legislative history of the 1996 amendment to § 1442(a), which brought federal agencies within the ambit of the statute, does not help its cause.[7] Congress's desire that federal agencies – no less than federal officers – should be able to invoke § 1442(a)(1) offers no support for the view that Philip Morris, a private regulated actor, may do so as well. Indeed, the quoted legislative history is entirely consistent with the view that federal agencies – whose *raison d'être* is enforcing federal law – should, like federal officers, be able to remove. *See, e.g.*, S. Rep. No. 104-366, at 30-31 (1996) ("A Federal forum in such cases is important since state court actions *against Federal agencies* and officers often involve complex Federal issues and Federal-State conflicts.") (emphasis added). The cited legislative history does not support a right to removal for private regulated parties.[8]

Philip Morris thus can offer no satisfactory defense of the Eighth Circuit's decision on the merits. As a private

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because statute "shield[ed] all who lawfully assist [a federal officer] in the performance of his official duty").

[7] Philip Morris never disputes that both *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991), and *Mesa v. California*, 489 U.S. 121 (1989), show that the Eighth Circuit erred in reading this Court's precedent as requiring a mechanical presumption of a broad interpretation of § 1442(a)(1) anytime the statute is invoked. *See* Pet. 20-21.

[8] Philip Morris's effort (at 27) to deflect the Eighth Circuit's conflation of preemption and removal is off the mark. This Court has consistently held that preemption defenses do not entitle private actors to removal, *see Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987), and that state courts are entirely competent to resolve such defenses, *see Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988). *See* Pet. 24-25. Nothing in the legislative history of the 1996 amendments evinces an intent to disrupt those venerable jurisdictional principles.

regulated actor, Philip Morris is not enforcing federal law, *see Willingham v. Morgan*, 395 U.S. 402, 406 (1969); not at risk from state animus against federal officials, *see Arizona v. Manypenny*, 451 U.S. 232, 241-42 (1981); and not in need of a federal forum to hear any official immunity defense, *see International Primate Protection League*, 500 U.S. at 86-87. None of the historical rationales for the statute therefore is at issue. *See* Pet. 21-23.

In all events, the United States has a significant stake in the proper construction of § 1442(a)(1). In all of the recent cases before this Court involving the federal officer removal statute, the United States has participated as a party representing a federal officer or as an *amicus curiae* stating its views to the Court.[9] Accordingly, if any doubt exists about the Eighth Circuit's erroneous position that Philip Morris was acting under a federal officer, then this Court should seek the views of the Solicitor General.

C. This Case Is An Excellent Vehicle For Resolving The Issues Raised In The Petition

This case affords an ideal opportunity for this Court to give a proper interpretation of the scope of § 1442(a)(1). The issue is purely one of law. *See* Pet. 25-26. Philip Morris's only contrary claim (at 17) is that the Seventh Circuit's decision to review a similar issue weighs against the need for review here. That is not so. If the Seventh Circuit reads *Venezia* as circuit precedent for an official function approach – and denies removal upon that basis – then the divide in the circuits will be no sharper than it is

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[9] *See Jefferson County v. Acker*, 527 U.S. 423, 432 (1999) (United States as *amicus curiae* supporting federal district court judges seeking removal); *International Primate Protection League*, 500 U.S. at 75 (Solicitor General represented the removing federal agency); *Mesa*, 489 U.S. at 124 (Solicitor General represented federal Postal Service employees); *Willingham*, 395 U.S. at 404 (Solicitor General represented removing defendants, warden and chief medical officer of federal prison); *Colorado v. Symes*, 286 U.S. 510, 515 (1932) (Solicitor General submitted a brief in opposition to remand of prosecution against federal prohibition officer).

today, and Philip Morris will likely not petition for certiorari (fearful of losing the benefits afforded by the Eighth Circuit's decision). This Court's opportunity to correct the Eighth Circuit's extraordinary holding, and to bring clarity to this issue, will thus be lost. But, if the Seventh Circuit, like the Eighth Circuit, upholds removal, the state of the law will only be more confused. Correcting the Eighth Circuit's erroneous holding now is therefore appropriate.

Issues of § 1442(a)(1) removal do not often arise in the courts of appeals because of the prohibition on appellate review of remand orders in 28 U.S.C. § 1447(d) (*see* Pet. 9 n.1). This case thus presents an especially attractive vehicle, with an undisputed record, to resolve this important jurisdictional question. Countless federal courts will continue to misapply the statute – allowing private regulated parties to remove state-law actions to federal court – in the interim.

D. *Watson* Raises Exceptionally Important Issues

Section 1442(a)(1) implicates exceptionally important jurisdictional interests. *See* Pet. 26-27.[10] Philip Morris does not disagree; instead, it erroneously believes that this case does not warrant certiorari because the Eighth Circuit's decision will be limited to the tobacco context and because the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4, affords an independent right to remove certain types of class actions like *Watson*.

First, the Eighth Circuit's reasoning cannot reasonably be limited to tobacco. *See* Pet. 27-30. The concurring judge's attempt to limit the case to light cigarettes –

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[10] Philip Morris wrongly suggests (at 18) that this Court need not worry about a wave of removals because *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998) – upon which the Eighth Circuit based its decision – did not produce such effects. Although it adopted a comprehensive control test, *Winters* did so in the government contractor context. The court below has now *extended Winters* in a way that invites private regulated actors to claim a right to removal that they did not have before. *See* Pet. 29-30 & n.17.

which did not garner the approval of the majority – cannot cloak the breadth of the Eighth Circuit's holding and test. *See* Public Citizen *Amicus* Br. 5-12.

Philip Morris's reliance (at 21) on CAFA to avert this Court's review is no more persuasive. The universe of cases in which § 1442(a)(1) may be invoked – under the Eighth Circuit's test – is far more expansive than the scope of cases affected by CAFA. Indeed, because the Eighth Circuit's test focuses on the actions of the *defendant*, not the plaintiffs, it is irrelevant in resolving this issue that the case is brought as a class action. Under the Eighth Circuit's logic, the federal officer removal statute may be invoked in any state-law action brought against a regulated company, *see, e.g.*, *Kelly v. Martin & Bayley, Inc.*, No. 05-CV-0409-DRH, 2006 WL 44183, at *3-*4 (S.D. Ill. Jan. 9, 2006), to which CAFA will have no application – a result far afield from Congress's purpose of ensuring that federal interests will be litigated in federal courts. Moreover, CAFA is subject to several important limitations, including exceptions for class actions involving defendants and class members who are mostly citizens of the forum State, actions with fewer than 100 class members, and shareholder actions or derivative suits based on state law. *See* CAFA § 4, 119 Stat. 9-10.[11] Accordingly, even with CAFA's enactment, the Eighth Circuit's decision will continue to afford private regulated companies of all types the ability to undermine the interest of States in having their judicial systems available to vindicate the interests of their citizens.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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[11] *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2640 n.12 (2005) (Ginsburg, J., dissenting) (noting that CAFA is "[s]ubject to several exceptions and qualifications"); *Robinson v. Cheetah Transp.*, No. Civ. A. 06-0005, 2006 WL 468820, at *3 (W.D. La. Feb. 27, 2006) (discussing "the 'Home State' exception and the 'Local Controversy' exception" to CAFA).

Respectfully submitted,

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